Supreme Court, U.S.
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No. 03-1002

IN THE

Supreme Court of the United States

MARIA DESOUZA

Petitioner

v.

UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Respondent

On Petition For Writ Of Certiorari To The State of California Court of Appeal For The Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the ruling of Prevailing Party is a violation of Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).

2. In light of jury finding of breach of Covenant of Good Faith and Fair Dealing, whether termination of employment and award of attorney fees results in improper taking, in violation of substantive Due Process Clauses of the U.S. Constitution.

3. Whether the award of attorney fees is a violation of First Amendment Freedom of Speech of the U.S. Constitution.

PARTIES

Pursuant to Rule 14.1(b), the caption on the cover represents all of the parties before the Court.

Maria DeSouza was the Plaintiff in the Trial Court and the Appellant at the Court of Appeal.

University of California, Davis Medical Center, The Reagents of University of California were the Defendants in Trial Court and Respondents in Court of Appeal.

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IN THE SUPREME COURT OF
THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is [x] unpublished.

JURISDICTION

[x] For cases from state courts:

The date on which the highest state court denied the petition for review was August 13, 2003. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the US Constitution provides that Congress shall make no law abridging the freedom of speech.

2. The Fifth Amendment to the Constitution provides in pertinent part: "nor shall any person.....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Section One of the Fourteenth Amendment to the Constitution provides in pertinent part "...nor shall any State deprive any person of life, liberty, or property, without due process of law....."

4. 28 U.S.C. § 2412(d) provides .....a court

shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action.

I. STATEMENT OF CASE

After a jury trial for wrongful employment termination based on race discrimination, safety violation against public policy and breach of a written employment contract the jury held University of California Regents (UC) breached the covenant of good faith and fair dealing. The trial court outside the presence of jury awarded UC attorney fees in the amount of $176,295.32. (Petitioner's Appendix page D-2)

A. Events Leading to Termination of Employment.

DeSouza began employment at UC in 1983. DeSouza was terminated from employment at UC in 1997 from which this lawsuit stems.

From March 1994 until 1997, DeSouza performed most of the UC laboratory HIV testing. In the early part of 1996 DeSouza's new supervisor instructed her she could no longer use the biohazard safety cabinet when processing positive

HIV samples, thus placing her at risk of contracting HIV. Instead of use of the safety cabinet she was instructed to use Tupperware containers to secure HIV positive samples.

In or about November 1996 DeSouza's supervisor told her that the protocol in place testing her periodically for HIV, which was being done to ensure lack of exposure to HIV virus, would be discontinued, supposedly due to change in management. Soon thereafter DeSouza was issued a letter of suspension.

On or about June 1997 another UC employee anonymously complained to the Occupational Safety and Health Agency (OSHA). (RT vol. III, 746:12-15). Shortly thereafter, in July 1997, DeSouza received a letter of intent to dismiss and was terminated from employment. (RT: vol. III, 742:17-19

B. Procedural history.

a. The underlying complaint.

DeSouza filed her first lawsuit (the "Complaint") in Sacramento Superior Court on or about July 1998. An amended complaint was filed on March 10, 1999.

In September 2000, the case went to trial on four causes of action: Breach of contract, breach of covenant of good faith and fair dealing, safety violation against public policy and racial discrimination against public policy. (Petitioner's Appendix page C-2)

b. <u>The jury verdict of Breach of Covenant of Good Faith and Fair Dealing</u>

The jury with a vote of 9 to 3 found UC breached the covenant of good faith and fair dealing. The jury also determined that Appellant suffered no economic damages. (Petitioner's Appendix page F-2)

c. Award of attorney fees

On December 8, 2000, DeSouza moved the trial court for an order of judgment notwithstanding verdict based on the jury's failure to award damages, even though evidence of damage was presented. Both parties presented motions for attorney fees. The trial court awarded UC attorney fees in the amount $176,295.32.

d. Determination of prevailing party

On December 19, 2000, the court found UC was the prevailing party despite the jury's finding that UC acted in bad faith. On January 17, 2001, Appellant filed an appeal from the court's order dated December 19, 2000. On January 26, 2001, an amended judgment was entered along with dismissal of the action. On February 26, 2001, Appellant filed an appeal from the amended judgment. Both appeals were consolidated on July 3,2001.

e. Appellate decision

At this stage, DeSouza raised the discriminatory impact the trial court's ruling had in denying DeSouza from bringing in any witnesses to testify as to her work habit and hospital laboratory practices. The Court of Appeal issued a ruling on May 21, 2003. It affirmed the trial court's decision. It further awarded UC the costs of appeal.

f. Petition for Review

DeSouza filed a petition for review on July 21, 2003. In this petition DeSouza raised the violation of First Amendment rights and the chilling effect of such a decision on DeSouza's right to make legitimate workplace complaint. The California Supreme Court denied the petition for review.

REASONS FOR GRANTING THE PETITION

I. REVIEW ON ISSUE NO 1 SHOULD BE GRANTED TO SETTLE IMPORTANT QUESTION OF LAW

1. The decision of declaring UC as the Prevailing Party is a violation of Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).

A. There is conflict among State Courts of Appeal on the meaning of the term "prevailing party"

California Civil Code Section 1717 describes "prevailing party for the purpose of awarding attorney fees in litigation involving contractual relations where the contract itself authorizes awarding attorney fees. This section has been determined not to require monetary relief for the determination of the prevailing party. The prevailing party can be a party who did not successfully obtain the relief which she sought in

the action *Epstein* v. *Frank* (1981, 2nd Dist) 125 Cal App3d 111,177.

B. <u>There is conflict between this State Appellate decision and Federal Law.</u>

Although EAJA does not define the term "prevailing party" plaintiffs may be considered prevailing parties for attorney fee purposes if they succeed on any significant issue in litigation, which achieves some benefit parties sought in bringing suit. *Austin* v. *Department of Commerce* 742 F2d 1417. Further, plaintiff who prevails in some but not all of claims against United States is prevailing party as to claims upon which government's position was not substantially justified. *Matthews* v. *United States* 713 F2d 677. In *Jean* v. *Nelson* 863F2d 759, affd 496 US 154, not withstanding that plaintiff had lost on equal protection argument and Administrative Procedure Act, Plaintiff was ruled to be the prevailing party for the purposes of EAJA because party need not obtain relief on every

claim or legal theory in order to be considered prevailing party. In addition, government employee who had sought reinstatement and back pay was prevailing party for purposes of award of attorney fees and expenses in accordance with 28 USCS § 2412(d) where he had prevailed on four of six issues on appeal, since it is not necessary to succeed on every issue. *Nackel* v. *DOT*, FAA 884 F2d 1378.

To the special verdict form #1 question No. 2: "Did defendant Regents breach the implied covenant of good faith and fair dealing with respect to the Settlement Agreement it had with plaintiff Maria DeSouza? The jury responded "yes".[1] The

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[1] Incidently, during the trial discovery, UC realized they had distributed sensitive patient information to DeSouza and others in violation of State and Federal laws. On September 29, 2003, UC filed a lawsuit against DeSouza asking for the return of these documents.
Section 120975 of California Health and Safety code

provides:

"To protect the privacy of individuals who are the subject of blood testing for antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) ....no person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS."

Under Section 120980(a) of California Health and Safety code:

"Any person who negligently discloses results of an HIV test, as defined in Section 120775, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to a written authorization, a civil penalty in an amount not to exceed one thousand dollars ($1,000) plus court costs, as determined by the court, which penalty and costs shall be paid to the subject of the test.

Code of Federal Regulations 164.506(a) "A covered

Court of Appeal's conclusion that UC is the prevailing party is legally untenable. Further, the state trial court failed to provide reason(s) for its ruling.

II. REVIEW ON ISSUE NO 2 SHOULD BE GRANTED TO SETTLE IMPORTANT QUESTION OF LAW

1. Failure of the California Supreme Court to grant the petition for review results in improper taking.

The Fourteenth Amendment forbids state actors from depriving individuals of life, liberty, or property without due process of law. *Graham* v. *Johnson* et. al., 249 F. Supp. 2d 565

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entity may not use or disclose protected health information without authorization." Pursuant to CFR 164.510, "the individual must inform the patient in advance of the use and disclosure and allow the patient an opportunity to agree or object."

(citing *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 569-570) Under the Fourteenth Amendment, the term "liberty"encompasses an array of rights, including the right "to engage in any of the common occupations of life." Id. at 572 (quoting *Meyer* v. *Nebraska*, 262 U.S.390, 399).

In the employment context, the Court has concluded that an employee's Fourteenth Amendment liberty interest may be implicated in one of two ways. First, an employee's liberty interest may be involved where-in making the decision to terminate an employee-charges are made which may seriously damage the employee's standing and association in the community. Secondly, the safeguards of the due process clause may come into play where the state, in dismissing an employee, has "imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Hoch* v. *County of Fayette*, et. al., 541 F. Supp. 781

Here, DeSouza was employed at UC for fourteen years. Her property and liberty interest in her employment has not been a subject of dispute during the course of trial and appeal.

2. Loss of State Employment Constitutes a Taking.

The Fourteenth Amendment protects substantive aspects of liberty against unconstitutional restrictions by the State." It is beyond dispute that an important aspect of individual liberty is the right to pursue a livelihood and engage in the common occupations of life. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Burns* v. *Brinkley* 933 F. Supp. 528-531

It has been stated that an individual's "right to hold specific private employment and to follow a chosen profession free from unreasonable

governmental interference comes within the "liberty' and "property' concepts of the Fifth Amendment." *Zee* v. *Reno*, 73 F.3d 1370 (citing *Greene* v. *McElroy*, 360 U.S. 474,492)

The Fifth Amendment to the Constitution says "nor shall private property be taken for public use without just compensation." For example, the Supreme Court generally has found a taking when the government confiscates property. In *Webb Fabulous Pharmacies, Inc.* v. *Beckwith* 449 US 155,159, the Supreme Court found a taking when the government took the interest accruing on an interpleader account.

Here, the jury found UC breached the covenant of good faith and fair dealing. Yet, DeSouza was not only not reinstated as a result of this breach but was also deemed not to be the prevailing party making her responsible for UC's attorney fees.

3. DeSouza's Termination is Not

Rationally Related to Public Purpose.

The Fifth Amendment authorizes the government only to take private property for "public use". The Supreme Court often has declared "one person's property may not be taken for the benefit of another person without justifying public purpose." *Thompson* v. *Consolidated Gas Corp.* 300 U.S. 55, 80

A taking is for public use if a rational basis test is met; it is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public. (74 Yale L.J. 36 (1964))

The trial court should conduct appropriate proceedings to determine whether plaintiff's action was in bad faith, frivolous, or vexatious so as to justify an award of attorneys' fees to Defendant. *Rosewitz* v. *Latting*, 689 F.2d 175-178.

In this case, it was proven UC acted in bad faith. The award of attorney fees to one who acts in bad faith cannot be in the best interest of the

public.

It appears that the State Trial Court and Court of Appeal disregarded the finding of UC's bad faith action and awarded UC attorney fees.

Further, the State Supreme Court denied the petition fcr review, hence allowing the lower court ruling to stand while depriving DeSouza of her property and liberty interest she had acquired in her employment at UC.

4. <u>The award of attorney fees should not subject plaintiff to financial ruin.</u>

An attorney fee award is reviewed for abuse of discretion. *Vo* v. *Las Virgenes Municipal Water Dist.* 79 Cal.App.4th 440,445 A trial court is required to make written findings when it awards attorney fees to a successful FEHA defendant. *Rosenman* v. *Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* 91 Cal.App.4th 859, 867-868, and cases cited at p. 867, fn. 398. Such findings should include a consideration of the

plaintiff's financial resources in determining the amount of attorney fees to award a prevailing defendant. An attorney fee award to defendant should not subject a plaintiff to "financial ruin." (*Id.* at pp. 868-869) In this case the trial court made no such findings. Moreover, the attorney fee award does not distinguish between the public policy causes of action and the non-public policy causes of action for breach of contract, safety violation, race discrimination and breach of covenant of good faith and fair dealing.

An attorney fee award must have a basis in statute, contract, or law. (California Code Civ. Proc., §§ 1021, 1032 & 1033.5, subd. (a)(10); *Santisas* v. *Goodin* 17 Cal.4th 599, 606.) Section 12965 of Cal. Code Civ. Proc., subdivision (b) authorizes attorney fees and costs only "[i]n actions brought under this section." It cannot authorize any award of attorney fees and costs as to non-FEHA causes of action.

III. REVIEW ON ISSUE NO 3 SHOULD BE GRANTED TO SETTLE IMPORTANT QUESTION OF LAW

1. The award of attorney fees after a favorable jury verdict chills DeSouza's expression and her right to exercise First Amendment rights.

This appeal arose from an award of attorney fees to UC. It was based upon UC's position that since DeSouza did not receive any monetary damages, they are the prevailing party. The decision overlooks the fact that the jury found UC breached the covenant of good faith and fair dealing.

This case is about public policy in California and in the United States-whether an individual who receives a favorable jury verdict on one of the major causes of action is responsible for the attorney fees of the opposing party under the

attorney fees clause of the contract.

The Court of Appeal in California agreed with the trial court in asserting that DeSouza was not the prevailing party. This decision has the chilling effect of deterring plaintiffs from mitigating damages and bringing lawsuits against employers even after the employer is found to have acted in bad faith. It further prevents plaintiffs who express concerns regarding legitimate workplace safety issues and racial discrimination from doing so.

By way of analogy, the anti-SLAPP statute, the California Code of Civil Procedure § 425.16 was enacted in 1992 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* § 425.16(a)

Here, the Court of Appeal reached a contrary conclusion, holding that despite the

plaintiff's favorable jury verdict of breach of the covenant of good faith and fair dealing, petitioner was not the prevailing party for the purposes of attorney fees and is responsible for the entire trial and appeal attorney fees of the opposing party. The California Supreme Court failed to review this issue.

This court should grant review because this decision has the chilling effect of deterring employees who are wrongfully terminated from bringing lawful suits against their employers and from becoming re-employed because they may be punished and be held responsible for the cost of trial even when the jury held the employer acted in bad faith.

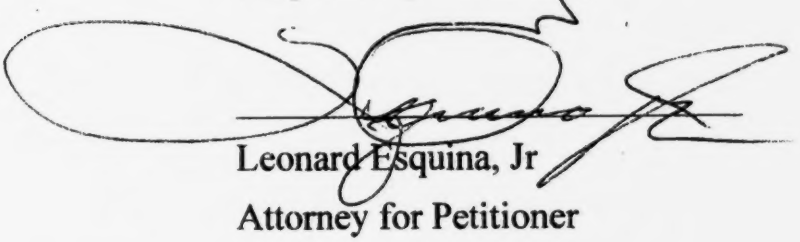
CONCLUSION

This case presents conflicts among Courts of Appeal on issues presented. It addresses issues relating to statutory civil law within the bounds of

the Federal and State constitutional rights of equality and fundamental public policy against racism, discrimination and whistle blowing and award of attorney fees while bad faith conduct is proven. DeSouza respectfully submits for review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Leonard Esquina, Jr
Attorney for Petitioner

Date: January 5, 2004

Court of Appeal,

Third Appellate District- No. C0373471

S117316

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARIA DESOUZA,

Plaintiff and Appellant,

v.

UNIVERSITY OF CALIFORNIA MEDICAL CENTER et. al.,

Defendants and Respondents

Petition for review DENIED.

Supreme Court

FILED

Aug 13, 2003

/GEORGE

Chief Justice

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MARIA DESOUZA,

Plaintiff and Appellant,

v.

UNIVERSITY OF CALIFORNIA MEDICAL CENTER et. al.,

Defendants and Respondents

C037471 AND C037737

Sacramento County

No. 98AS03790

BY THE COURT:

Appellant's petition for rehearing is denied.

Dated: June 16, 2003

BLEASE, Acting P.J.

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cc: See Mailing List

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT
(Sacramento)

MARIA DeSOUZA, C037471, C037737
Plaintiff and Appellant, (Super. Ct. No. 98AS03790)
v. Filed:May 21 2003

UNIVERSITY OF CALIFORNIA DAVIS MEDICAL CENTER et al.,
Defendants and Respondents.

Certified laboratory technologist Maria DeSouza sued her former employer, the University of California Davis Medical Center and the Regents of the University of California

(collectively, the University), for wrongful termination and breach of contract, among other causes of action.[1] The University denied wrongdoing, and maintained it properly dismissed DeSouza for deficient job performance.

The matter proceeded to trial on four causes of action: (1) breach of contract involving a 1994 settlement agreement;(2) breach of the implied covenant of good faith and fair dealing; (3) wrongful termination in violation of public policy based on race;[2] and (4) retaliation for reporting safety concerns. The jury determined that the University neither breached its written contract with DeSouza, nor terminated her for reasons of retaliation or race. Although the jury found that the University breached the covenant of good faith and fair dealing implied in the written settlement

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[1] DeSouza also named as defendants several employees of theUniversity of California Davis Medical Center. However, trial proceeded solely against the University.

agreement, it awarded no damages on that claim. In posttrial proceedings, the court determined that the University was the prevailing party in the litigation, and awarded it $176,295.32 in attorney's fees and costs.

In case No. C037471, DeSouza appeals from the October 20, 2000, judgment entered on the jury verdicts, and from the December 19, 2000, order denying motions for new trial and judgment notwithstanding the verdict, and awarding attorney's fees. In case No. C037737, DeSouza appeals from the amended judgment entered in favor of the University on January 26, 2001, and awarding attorney's fees. She contends the trial court erred in: (1) refusing to admit evidence of her work habits at other places of employment; (2) denying motions for new trial and judgment notwithstanding the[2] verdict based on the jury's failure to award damages in the cause of action for

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[2] DeSouza alleged in her complaint that she is "Indian/Portuguese" with dark skin.

breach of implied covenant of good faith and fair dealing; (3) denying her motion for new trial based on jury misconduct; and (4) awarding the University attorney's fees pursuant to Civil Code section1717 or, alternatively, failing to apportion the attorney's fees between the contract and tort claims. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The 1994 Settlement Agreement

The University hired DeSouza in 1983, dismissed her some years later, and reinstated her under a 1994 settlement agreement. Under the terms of that agreement, the University agreed to reinstate DeSouza as a certified laboratory technologist specialist, assign her to work in the University Diagnostic Laboratory under the supervision of Sandra Hatcher,and provide "training as [was] reasonably required to enable her to accomplish the duties and responsibilities of the position."The University also agreed there would be no probationary period, it would expunge from

DeSouza's personnel and departmental records all documents related to her earlier discipline and dismissal, and it would not subject her "to reprisal in any way whatsoever, for the filing of any grievance or complaint in any forum."

Work in the University Diagnostic Laboratory

In March 1994, DeSouza began work for the University in the diagnostic or molecular laboratory (the lab) . Dr. James Carlson was the director fo the lab, and Sandra Hatcher was the lab's general supervisor.

Accuracy and precision in testing procedures is critical for a clinical laboratory technologist, because medical decisions are based upon the results of such tests. For that reason, it is very important that a clinical laboratory technologist complete paperwork accurately.

Hatcher evaluated DeSouza's performance in July 1994. She characterized DeSouza's work as satisfactory, but with concerns, and indicated DeSOuza was committing technical errors. In 1995 DeSouza's overall rating was "fully satsifactory."

Events Leading to DeSouza's Dismissal

In May 1996, DeSouza received a letter of warning, which identified errors made by her which included: (1) reporting a positive HIV result on a potential transplant candidate who was truly HIV negative; (2) errors in testing attributed by the University to DeSouza's poor technique that resulted in splattering or spilling a sample from a positive specimen into the negative control; and (3) use of Scotch tape on a test strip that made reading and interpreting the strip more difficult. DeSouza responded to each alleged incident in writing, and denied wrongdoing or mistakes. She attributed the errors instead to faulty test kits, or other routine problems in the operation of a laboratory.

After receiving the letter of warning, DeSouza agreed to undergo retraining on HIV testing, to report to her supervisor any discrepant or borderline test results, to prepare reports early in the day for review by others, not to deviate from test procedures without permission, and to promptly report any concerns regarding testing or

equipment performance. Hatcher informed DeSouza that any failure to make the required improvements could result in further corrective action, including dismissal. Thereafter, DeSouza received retraining in HIV testing, and cross-training in tests for rubella, herpes, cytomegalovirus 1GM, cytomegalo virus IGG, Lyme's disease, varicella zoster virus, and certain auto-immune diseases. She also received instruction in using the laboratory information system. Hatcher lowered DeSouza's July 1996 performance evaluation to "improvement needed," based on her failure to improve after issuance of the letter of warning.

In November 1996, DeSouza received a letter of intent to suspend prepared by Hatcher and Carlson. The letter identified ten incidents of error or deficiency in her performance that occurred after the letter of warning, and included supporting documentation on each alleged incident. It stated that despite a program implemented to help DeSouza improve her job performance, her

performance had not improved. The problems included DeSouza erroneously reporting a positive HIV test as negative; erroneously recording patient information; erroneously issuing a tuberculosis test result; failing to use the correct controls for certain tests; and mislabeling test names.

DeSouza responded in writing to the letter of intent to suspend, and denied errors or wrongdoing. She attributed the errors in recording patient infor~nation to illegibility in the original document, errors in the use of test controls to someone else having "put the controls from one kit into the kit for another type of test," and blamed errors in mislabeling on Hatch's typographical error. DeSouza said the erroneous issuance of a tuberculosis test resulted from someone else's use of her stolen computer password, and blamed the mistaken HIV test result on the failure of the person reviewing her results to catch the error.

Thereafter, DeSouza filed a grievance protesting the University's decision to suspend her. The hearing officer upheld the suspension. He

rejected DeSouza's claim she was being treated unfairly, and concluded DeSouza might perform better in another area of the lab. DeSouza was suspended one- week in late November or early December 1996.

After taking a brief disability leave in March 1997, DeSouza returned to work at the lab at 60 percent of full time.She worked at another lab in Sacramento during the same period.

DeSouza's performance did not improve. She received an "unsatisfactory" evaluation from Hatcher in June 1997. In July1997, the University issued a letter of intent to dismiss. It stated that DeSouza had failed to correct deficiencies outlined in the previous letters of warning and suspension, and in the1996 and 1997 performance evaluations. The letter identified: (1) five errors in test reporting, including a failure to report that a herpes specimen was not from the patient, but from the patient's father; (2) 11 errors in test performance, which included performing the wrong test; and (3) nine clerical or miscellaneous errors, which

included sending Ely results to the wrong location. The University terminated DeSouza in early August 1997. DeSouza contested her dismissal through the University's administrative process, and filed suit in superior court to "protect [her] statute of limitation."

DeSouza 'a Case

DeSouza's theory at trial was that the reasons proffered by the University for her dismissal were trivial or pretextual, that its personnel actions were not properly and fairly administered, and that, in fact, she was disciplined and harassed for making complaints about safety procedures in the lab in violation of the settlement agreement. DeSouza's own testimony formed the lion's share of evidence in support of her case.

DeSouza attributed her dismissal to reprisal for having made complaints about safety issues in the lab. Specifically, she testified that "every time [she] made safety complaints either to the University personnel or to outside agencies[,]...I've been reprimanded either through letters of warning,

suspension, dismissal and poor performance evaluations." She stated that making a safety complaint about the hazards of bleach fumes in the lab in June 1994 caused her to receive a performance evaluation of "satisfactory but with concerns in July 1994. According to DeSouza, the University started the process to fire her only after she met with Sandra Hatcher and Jim Carlson in January 1996 to discuss safety concerns related to HIV testing (including the use of protective lab wear, use of the biohazard safety cabinet, and dilution of bleach to 10 percent to avoid fumes).

DeSouza also testified that, notwithstanding the settlement agreement's requirement that she "receive training as is reasonably required" for her position, her requests to be trained in DNA testing went unheeded. Over the course of three years she did not receive permission to attend during working hours any continuing education seminars that were sponsored by the University and necessary for her continuing education. Other lab staff were permitted to attend.

According to DeSouza, she was evaluated within three months of reinstatement, despite the settlement agreement's provision that she was not to be a probationary employee after her reinstatement. In addition, DeSouza was denied "a lot of privileges" normally given to other senior specialists of the same rank. Specifically, she was not allowed access to department of pathology e-mail, was not relieved from performing "bench work" or patient testing, had no opportunity to attend continuing education classes, and was excluded from"interact[ingl with management on a routine basis." Hatcher did not allow DeSouza to attend a meeting to which supervisors and other senior specialists had been invited, and selected another, less-senior employee to assume supervisory responsibilities while she was on vacation.

Although DeSouza agreed as part of the settlement agreement not to "make unnecessary visits" to her former workplace at the University for six months, she considered it a violation of the

settlement agreement that Hatcher "treated [her] like literally a criminal" when she returned to that lab to pick up mail.

DeSouza also testified that, although the settlement agreement provided that any dispute over the agreement would be determined by an ombudsman, the University required her to consult with him on her own time. The settlement agreement stated that documents relating to DeSouza's 1992 discipline and dismissal would be expunged from her personnel file, but when DeSouza reviewed her file in 1996, she saw that some documents were still there.

DeSouza further testified that she was harassed by the University in the following ways: (1) she was "made to be the only person performing HIV testing" even though there was another person trained and qualified to perform it; (2) she was never given a key to the lab or left alone in the lab; and (3) she was directed to leave her purse in a basement locker rather than bringing it into the lab. In addition, Hatcher denied

DeSouza's request for time off from work to vote, and told her not to take breaks with another lab employee.

DeSouza stated that Hatcher yelled at her, and "any time [DeSouza] would point out a problem with the laboratory, [Hatcher] would become real defensive and raise her voice."According to DeSouza, Hatcher slammed the door on DeSouza's foot after she delivered the 1997 performance review.

Asked at trial about the errors identified in the letter of intent to dismiss, DeSouza continued to deny the mistakes in almost every instance. She characterized the University's criticisms of her performance as "trivial, minute, day-to-day human interactions . . [that] were magnified to the point to make any person think that I was making mistakes . To bolster her claim that the University treated her unfairly, DeSouza introduced the testimony of two experts. Dr. Arthur Zabelman, the director of clinical operations for a commercial laboratory, was experienced in laboratory testing procedures,

including testing for HIV. He reviewed the documents related to the University's discipline of DeSouza, and assumed DeSouza's responses to the letter of intent to dismiss were truthful. Zabelman acknowledged that "there were errors that were made" but stated, "[a] lot of the errors were, I think, minor errors." Specifically, he opined that only one of the mistakes -- reporting a result on the wrong person -- was a serious error, but it was not entirely DeSouza's fault. Of the alleged errors in test performance, Dr. Zabelman agreed that two could have been mistakes on DeSouza's part, but testified it was"hard to pin[]down" some of the test failures, or to ascertain exactly what happened in each instance. He stated that other errors had no visible ill effect on patient care. As to the alleged clerical errors, Dr. Zabelman agreed most were DeSouza's errors, with one exception.

Under cross-examination, Dr. Zabelman conceded that he had attempted to dismiss an employee in whom he had lost confidence and trust. He testified that he expected his own

employees to take responsibility when they made an error, and acknowledged that DeSouza's responses to alleged errors were nearly all "defensive in nature," and never saying "I made this mistake[]."

Cynthia Brandt, the director of laboratory services at Redding Medical Center, also experienced in laboratory procedures including HIV testing, reviewed the circumstances of DeSouza's dismissal. Brandt read the letter of intent to dismiss, and opined that the errors alleged were no more significant "than what normally happens in a day-to-day operation in a hospital laboratory." She characterized the letters of intent to dismiss, intent to suspend, and warning as "a conglomeration of insignificant clerical errors being grouped together to attack an individual." Specifically, Brandt testified that some of the test reporting errors -- such as DeSouza's reporting an immune result of 1.2 instead of 1.6, her failure to note that a herpes simplex specimen was from the patient's father, and two of the test performance

errors -- were of little or no significance, and "no patients were in any way diagnostically compromised." That DeSouza reported the of a rubella test on the wrong patient would have caused Ms. Brandt only to counsel DeSouza. She also opined that DeSouza's use of Scotch tape, as mentioned in the letter of warning, was "of no significance."

On cross-examination, Brandt acknowledged that accurate testing by laboratory employees was very important. It was likewise very important for employees to take responsibility for their actions and improve their conduct when errors were brought to their attention. Brandt agreed that incorrectly reporting a positive HIV result as negative was a serious error.

Finally, Dr. Sue Barton, a licensed clinical psychologist, testified that in 1997 she diagnosed DeSouza as suffering from adjustment disorder with depression and anxiety as a result of her experiences at work. DeSouza reported to Barton that she felt she was under excessive and unfair

scrutiny at work, and that her superiors had spoken to her in a demeaning way.

The University's Defense

The University described the case as being about three things: "precision, trust and responsibility." It maintained dismissal was proper because DeSouza failed to take responsibility for her mistakes, and failed to correct documented deficiencies in her performance when given numerous opportunities to do so. The University argued it "had an obligation to make sure that it didn't have an employee working there who was endangering the health or even maybe the lives of patients. Dr. Carlson testified that he was initially very pleased to have a clinical technologist as experienced as DeSouza joining his lab. Before DeSouza started work, he knew nothing about her, the prior lawsuit, or the settlement agreement. When DeSouza joined the lab, he assigned her to do HIV testing, because there were very few people to do DNA testing and HIVserology. Carlson became aware of DeSouza's problems in

performing the tests within six months of her joining the lab. The errors were potentially serious, because they could lead to an HIV positive person receiving a negative result. At a later point, Carlson saw some handwritten documents that suggested that DeSouza might have manipulated test results. But, as he was trying to give her "a lot of leeway at this point in time," and "trying to make it a situation where she could succeed in that laboratory," he gave her the benefit of the doubt.

By 1996, however, DeSouza's "pattern of errors, careless errors . . . really was more than [he] would be able to expect from other technologists." Carlson concluded that disciplinary action was necessary. In addition to the fact that some of the errors "came very close to being detrimental to the patient,"Carlson was concerned about DeSouza's "inability to take full responsibility for the errors that were committed." He decided to issue the letter of warning. By retraining DeSouza from testing for other diseases, Carlson hoped she could be more successful. He spoke with DeSouza in an

effort to understand why an experienced technologist had such "a persistent technical error rate." She told him she was bored with her job, and was attending law school. DeSouza was never trained to do DNA testing because her error rate made Carlson think she could not do anything more technical than what she had been doing.

After the letter of warning issued, Carlson conceded that they were "looking at her more closely." When DeSouza did not improve, Carlson issued the letter of intent to suspend. Among"careless errors" listed, DeSouza had reported a baby's positive HIV test as negative. Dr. Carlson decided to take steps to dismiss DeSouza based on "the accumulation of errors over the time period and her resistance . . . in terms of . . . correcting her errors."Unlike the experience with other employees, it was "very, very difficult" to get DeSouza to say that she — and not "some inanimate object" -- actually caused error. Carlson wrote the letter in consultation with Hatcher and the business manager. Carlson testified that of the

200 certified laboratory technologists he had worked with, none had ever made mistakes of the type or quantity that DeSouza did.

DeSouza's supervisor, Sandra Hatcher, testified she was not told why DeSouza was being reinstated, and did not receive a copy of the settlement agreement. She learned of the settlement agreement in 1994 when DeSouza claimed it precluded the lab from assigning her to do HIV testing. Hatcher also discovered that the settlement agreement prohibited DeSouza from going to the clinical laboratory where she had worked prior to 1992, except for business reasons.

Hatcher testified that, although "everybody makes mistakes"in the laboratory, "the only way to improve on them (was] to acknowledge that you made them so that they don't happen again."According to Hatcher, DeSouza consistently refused to take responsibility for her errors, as other technologists did. Moreover, other employees did not make the same kind or numbers of errors as DeSouza. Ultimately, Hatcher "no longer could

trust her work." In Hatcher's view, the errors in test reporting identified in the letter of intent to dismiss were the same errors DeSouza made before her suspension. The clerical errors showed a "sloppiness in the performance of her work."According to Hatcher, this inattention to detail could potentially damage the patient. Responding to DeSouza's trial testimony, Hatcher denied slamming the door on DeSouza's foot following her 1997 performance review. She testified instead that DeSouza was upset about the review, and complained that Hatcher did provide full documentation of the alleged shortcomings. denied telling another employee not to take breaks with DeSouza. However, she admitted that she raised her voice twice in conversations with DeSouza: once to interrupt an argument between DeSouza and another employee, and once when DeSouza became upset while another employee was trying to teach her to multi-task.

Hatcher also countered DeSouza's claims of ill treatment.She denied that DeSouza was

excluded from management meetings and, office parties. Hatcher explained that she did not select DeSouza to act as supervisor in her absence because another employee was more familiar with the administrative duties. Only two people in the lab had e-mail addresses, but DeSouza could have used the University e-mail system like everyone else. DeSouza received a card key to the lab when it moved to its new location. Before that time, not all employees had a key, and she never asked for one.

The University also introduced evidence that DeSouza was treated no differently than other technologists. All technologists in the lab were required to have their work reviewed by others, and DeSouza was not subjected to more scrutiny than others in the same position. All technologists in the lab were required to report problems with the tests they performed. In addition, the University asked all who worked in the lab to leave their purses and other personal belongings in lockers outside the lab. DeSouza, like other lab employees,

wasencouraged to attend continuing education classes, and did so on several occasions.

The University also presented evidence to rebut DeSouza's claim that she was dismissed in retaliation for making a complaint to CAL/OSHA or otherwise raising concerns about safety in the lab. According to Hatcher, it was not unusual for lab employees to meet to discuss safety issues. DeSouza's expressions of concern about safety issues did not upset Carlson or Hatcher. DeSouza received a satisfactory evaluation in 1995 after expressing concern about various safety issues. The fact DeSouza filed a complaint with CAL/OSHA could not have prompted the University to dismiss her, because she made her single anonymous complaint to CAL/OSHA after the decision had been made.

The Special Verdicts

Following deliberations, the jury returned its special verdicts. Special verdict form #1 involved the claims for breach of contract and breach of the covenant of good faith and fair dealing. Special

verdict form #2 related to claims of wrongful termination based on race and retaliation.
The first question on special verdict form #1 read: "Did Defendant REGENTS breach the [s]ettlement [a]greement it had with Plaintiff MARIA DeSouza?" The jury answered "No" by a vote of nine to three. Polling revealed the dissenters as Jurors No.2, 7, and 8. The second question asked: "Did Defendant REGENTS breach the implied covenant of good faith and fair dealing with respect to the Ls]ettlement [a]greement it had with Plaintiff MARIA DeSouza?" The jury answered "Yes" by a vote of nine to three. The dissenting jurors were Jurors No. 6, 11 and 12. The third question read: "Did Plaintiff suffer economic loss, as that term has been defined in the jury instructions, as a result of Defendant's conduct?" By a vote of nine to three, the jury responded "No," and the dissenting votes were from Jurors No. 2, 7, and 8.

The jury unanimously answered "No" to the first question on special verdict form #2: "Did

Defendant REGENTS terminate Plaintiff's employment because of her race?" All but one, Juror No. 8, also responded "No" to the second question on special verdict form #2: "Did Defendant REGENTS terminate Plaintiff's employment because she made complaints regarding safety?"

The trial court entered judgment on the verdicts in favor of the University and against DeSouza.

Post-Trial Motions

DeSouza moved for new trial and judgment notwithstanding the verdict. Both parties moved for attorney's fees. The trial court denied DeSouza's motion for new trial, finding "[n]o good cause has been shown." It found "there [was] substantial evidence in support of the verdict," and denied the motion for judgment notwithstanding the verdict. On the issue of attorney fees, the court found that the University was the prevailing party. It awarded the University attorney fees and costs in amount of $176,295.32.

DISCUSSION

I

Evidence off Character and Habit

DeSouza wanted to introduce evidence of "work performance in the workplace as a clinical laboratory scientist." She offered the evidence to show she was qualified to perform the work she was assigned at the University, and that her dismissal for poor performance was a pretext. Although not described in any detail in DeSouza's briefs on appeal, it appears the evidence consisted of her testimony about certain documentary evidence of training and commendations, a letter of recommendation prepared by someone employed by the University,and a written evaluation of DeSouza's performance at Sierra Nevada Labs dated March 1995. Citing Evidence Code sections1101 and 1104, the University opposed introduction of the evidence on the ground it was inadmissible character evidence. The trial court agreed. DeSouza contends the trial court abused its

discretion in refusing to admit what she characterizes on appeal as "evidence of habit." We reject this contention.

"It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant .....'[Citation.]" (Brokopp v. Ford Motor Co. (1977) 71 Cal.App.3d 841, 851, quoting Larson v. Larsen (1925) 72 Cal.App. 169, 172.) This rule is codified in Evidence Code section 1104, which: "Except as provided in Sections 1102 and 1103[concerning evidence of the character of criminal defendants and victims of crimes, respectively], evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion." The Law Revision Commission Comment to section 1104 states in part: "Section 1104 codifies well-settled California law.Towle v. Pacific Improvement Co., 98 Cal.

342, 33 Pac. 207(1893). The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule." (Cal. Law Revision Cam. corn., 29B West's Ann. Evid. Code (1995 ed.) fall. § 1104. p. 494; see also Hinson v. Clairemont Corrirnunity Hospital (1990) 218 Cal.App.3d 1110, 1120—1122 [physician's performance in medical school and his termination from two hospitals was inadmissible character evidence under Evidence Code sections 1101, subd. (a) and 1104, and irrelevant to the question of his negligence on a specific occasion], disapproved on other grounds in Alexander v. Superior Court (1993) 5 Cal.4th 1218, 1228.)

We conclude the trial court did not abuse its discretion by excluding evidence of how DeSouza performed for other employers. At issue here was

whether the University dismissed her for good cause, that is, for failure to maintain the required work performance standards in the lab while, for example, performing tests and reporting results in accordance with lab protocol. How DeSouza performed in other laboratory settings, applying other testing and reporting protocols, was not relevant to whether she performed adequately in the University's lab on the occasions specified in the various disciplinary notices

DeSouza insists that evidence of "her work performance habits in other similar places of employment" were admissible under Evidence Code section 1105, which reads: "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit custom." (Italics added.) There is no indication in the record that DeSouza sought admission of the evidence on this ground at trial.[3] Accordingly, the issue is

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[3] Contrary to DeSouza's argument in the reply brief, when read in context, the court's reference to the

waived on appeal. (In re Mark C. (1992) 7 Cal.App.4th 433, 444—446; Evid. Code, § 354.) In any event, DeSouza fails to specifically identify the proffered evidence, let alone show how it demonstrated habit or custom within the meaning of Evidence Code section 1105. Error must be affirmatively shown. (Null v. City of Los Angeles (1988) 206 Cal.App.3d 1528, 1532.)

Special Verdict on Damages

As we explained, the jury returned a special verdict finding that although the University breached the implied covenant of good faith and fair dealing with respect to the settlement agreement, DeSouza suffered no economic loss "as a result of" the University's conduct. DeSouza moved unsuccessfully for new trial or, alternatively, entry of judgment notwithstanding the verdict, on grounds the jury "violated [its] duty

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proffered evidence as "just general type of information about work habits" means a general character trait for skill.

to award damages as proved by the evidence," ignored the relevant jury instructions, and rendered an insufficient verdict. In DeSouza's view, the jury was required as a matter of law to award her damages in the form of lost wages, lost future income, and lost retirement income once it found the University breached the covenant of good faith and fair dealing. She renews these arguments on appeal. Applying familiar standards of review to what is essentially a challenge to the sufficiency of the evidence, we conclude the court properly denied both motions.

Code of Civil Procedure section 629 states that the trial court "shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." Thus, in ruling on the motion for judgment notwithstanding the verdict, "the trial court may not weigh the evidence or judge the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the

evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict." (Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal.App.4th 687, 703.) DeSouza's appeal from the trial court's denial of her motion is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision. (Ibid.) Thus, we review the trial court's ruling in the light most advantageous to the University, resolving all conflicts in its favor, and giving it the benefit of all reasonable inferences in support of the verdict. (Ibid.)

The standard is different on review of the order denying a motion for new trial under Code of Civil Procedure section 657 [4]. The trial court shall

[4] Code of Civil Procedure section 657 provides in pertinent part: "The verdict may be vacated and any

not grant a motion for new trial "upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the... . jury clearly should have reached a different verdict . . ." (Code Civ. Proc., § 657.) The trial judge is "accorded a wide discretion in ruling on a motion for new trial and that the exercise of this discretion is given great deference on appeal." (City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 871-872.) However, in our review of an order denying a new trial, as distinguished from an order granting a new trial, we must review the entire record, including the

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other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial . . .

evidence, so as to make an independent determination as to whether the error, if any, was prejudicial. (Id. at p. 872.)

DeSouza's argument begins with a false premise -- that the jury found in her favor on the cause of action for breach of implied covenant of good faith and fair dealing. She confuses the elements of a cause of action for breach of covenant of good faith and fair dealing with the finding on a single element of that cause of action. Outside the context of insurance contracts, a cause of action for breach of covenant of good faith and fair dealing is founded in contract, not tort. (Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal.4th 85,93-95.) Damages are an essential element of a cause of action for breach of contract. (4 Witkin, Cal. Procedure (4th ed.1997) Pleading, § 476, p. 570; McDonald v. John P. Scripps Newspaper (1989) 210 Cal.App.3d 100, 104.) To prevail, the plaintiff must establish "a causal connection between the breachand the damages sought." (1 Witkin, Summary of Cal. Law (9th ed.

1987) Contracts, § 814, P. 733.)

DeSouza specifically argued in rebuttal that she was entitled to lost wages, lost future income, and lost retirement income as a result of the University's material breach of contract. She did not argue there were additional or separate damages related to her cause of action for breach of implied covenant of good faith and fair dealing. Indeed, in closing argument she failed entirely to distinguish between University conduct that supported her claim of breach of contract and conduct that supported her claim of breach of covenant of good faith and fair dealing. Thereafter, the court instructed the jury on the elements of the cause of action for breach of implied covenant of good faith and fair dealing, including damages -- that "such conduct caused plaintiff to suffer injury, damage, loss or harm." (Italics added.) It also read a modified version of BAJI No. 10.38 (8th ed. 1994): "If defendant breached the implied covenant of good faith and fair dealing, you will award to plaintiff such damages as were caused to plaintiff

by such breach. Such damages must include the value of the loss of compensation and benefits and other consequential financial damage." (Italics added.) DeSouza maintains the jury "chose to ignore said instructions," and "the resulting verdict was 'insufficient.'" She is mistaken.

DeSouza does not dispute that the court properly instructed the jury to award DeSouza only those damages she proved wereccaused by University's breach of the implied covenant. We presume the jurors followed the court's instructions. (People v. Hamilton (1988) 45 Cal.3d 351, 375.) The jury responded "No"in special verdict form #1 when asked, "Did [DeSouza] suffer economic loss, as that term has been defined in the jury instructions, as a result of [University's] conduct?" (Italics added.) DeSouza's cause of action for breach of implied covenant failed because the jury rejected the claim she suffered damages as a result of the University's breach of covenant.

By its complete rejection of DeSouza's

claims for breach of the settlement agreement and wrongful termination, the jury necessarily rejected DeSouza's claims that the University dismissed her for reasons of retaliation or discrimination, and that the reasons given f or dismissing her were trivial, capricious, unrelated to business needs or goals, pretextual, or otherwise illegitimate. The jury's decision to award no damages for breach of covenant of good faith and fair dealing is consistent with the implied finding that damages in the form of lost wages, lost future income, and lost retirement income claimed by DeSouza were related to the alleged material breach of the settlement agreement itself -- precisely what DeSouza argued to the jury at the close of trial.

III

Jury Misconduct

DeSouza blamed the jury's failure to award damages in her cause of action for breach of the covenant of good faith and fair dealing on jury misconduct. For this reason, she based hermotion for a new trial, in part, on claims of misconduct

under Code Civil Procedure section 657, subdivision 2.[5] DeSouza argued a new trial was warranted because "certain jurors intimidated cajoled and abused the process." She submitted the declaration of Juror No. 8, Eunice Freeman, in support of her motion. The University submitted counter-declarations prepared by Juror No. 1, Barbara Conley, Juror No. 10, Steve Richardson, and Juror No. 11, Patricia Wheeler. It also moved to strike Freeman's declaration pursuant to Evidence Code section 1150, arguing it contained inadmissible speculation about the thought processes of the jurors. The court granted the University's motion to strike portions of the

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[5] Code of Civil Procedure section 657, subdivision 2 provides for new trial on grounds of "[m]isconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of anyone of the jurors."

Freeman declaration, and denied the motion for new trial for lack of good cause.

On appeal, DeSouza contends the court abused its discretion in denying her motion for new trial. She maintains Juror No. 1, Juror No. 6, and Juror No. 11 created bias and unfairness injury deliberations by excluding, isolating, interrupting,intimidating, and refusing to listen to other jurors. DeSouza says Juror No. 1 prejudged the case.

Subject to the restrictions of Evidence Code section 1150, a party may offer proof of jury misconduct by way of juror declarations. (People v. Hutchinson (1969) 71 Cal.2d 342, 350-351.) Evidence Code section 1150, subdivision (a) limits evidence of such misconduct to "otherwise admissible evidence. . . as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or

event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."(Italics added.) Evidence Code section 1150 "properly distinguishes between 'proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . .'" (Krouse v. Graham (1977) 19 Cal.3d 59, 80, quoting People v. Hutchinson, supra, at p. 349.) The rule embodied in Evidence Code section 1150 also "'serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.'" (In re Hamilton (1999) 20 Cal.4th 273, 294, fn. 17,

quoting Hasson v. Ford Motor Co.(1982) 32 Cal.3d 388. 414.)

Faced with a new trial motion alleging jury misconduct, the trial court: (1) determines whether the affidavits supporting the motion are admissible; (2) decides whether the facts establish misconduct; and (3) if misconduct is found, determines whether the complaining party was prejudiced by the misconduct.(Bell v. State of California (1998) 63 Cal.App.4th 919, 932; see also People v. Hill (1992) 3 Cal.App.4th 16, 37—38, fn. 8 [decisions draw no distinction between civil and criminal cases in considering jury misconduct], disapproved on another ground in People v. Nesler (1997) 16 Cal.4th 561, 582, fn. 5.)

We already explained that in reviewing an order denying a motion for new trial, "we independently review the record to determine whether misconduct, if it occurred, prevented a fair trial." (Vomaska v. City of San Diego (1997) 55 Cal.App.4th 905, 910.) DeSouza cites specific portions of Freeman's declaration to support her

argument. As we explain, our review of the admissible parts of the declaration fails to reveal any juror misconduct. We therefore conclude the court acted within its discretion in denying DeSouza's motion for new trial on that ground.

A. "On October 18, 2000, when the matter first went to the jury, Juror number one said to me, 'This will be fast, everyone is on the same sheet of music.' I replied, 'Not necessarily.' "

We reject DeSouza's contention that this statement shows that Juror No. 1 improperly "engaged in acts designed to discourage deliberations." It is true that each juror must have the opportunity to participate fully in deliberations in order to satisfy the constitutional right to trial by jury. (See Griesel v. Dart Industries, Inc. (1979) 23 Cal.3d 578, 584, overruled on another ground in Privette v. Superior Court (1993) 5 Cal.4th 689, 696.) Overt conduct or statements pressuring jurors to close deliberations before they are ready may constitute misconduct. (See Vornaska v. City of San Diego, supra, 55 Cal.App.4th at p. 912, fn. 12.)

At the same time, Juror No. 1's statement that "This will be fast, everyone is on the same sheet of music" is not of "such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) Indeed, Juror Freeman's response of "Not necessarily" shows that Juror No. 1's statement was not likely to have influenced the jury to close deliberations before the other jurors were ready.

DeSouza also maintains that Juror No. 1 improperly "prejudged the case." "Prejudgment" refers to a juror's having formed and/or expressed an opinion prior to the submission of the case. (See, e.g., Clemens v. Regents of University of California (1971) 20 Cal.App.3d 356, 361, 362 [juror failed to disclose his bias during voir dire, but discussed it with several other jurors during trial and before deliberations began]; and City of Pleasant Hill v. First Baptist Church (1969) 1 Cal.App.3d 384, 429 [a juror who formed and expressed an opinion prior to the submission of the case violates the prescribed protocol for the

performance of his duties]; see also Code Civ. Proc., § 611 [jurors shall be admonished "not to form or express an opinion (on any subject of the trial) until the case is finally submitted to them"].) There is nothing in Freeman's declaration to suggest Juror No. 1 formed or expressed an opinion on the case before the jury commenced deliberations. His comment -- "This will be fast, everyone is on the same sheet of music" -- came "when the matter first went to the jury."Once a case has been submitted to the jury, it is not misconduct for individual jurors to express their view of the case, or even to vote to decide it, before engaging in actual discussion.(Vornaska v. City of San Diego, supra, 55 Cal.App.4th at p. 912 [no misconduct for jurors to take a straw vote, and decide to render a verdict rather than discuss the issue further when that vote revealed 10 jurors were in agreement] .)

B. "Juror number one then said, 'We don't need your input, we only need nine.' Thereafter my comments and input

were ignored."

The court ruled the second sentence of this paragraph inadmissible, and DeSouza does not challenge that ruling. Instead, she argues that the first sentence demonstrates Juror No. 1 "overtly attempted to exclude Juror Freeman from deliberations." There is no merit in this argument.

Freeman's account of Juror No. 1's remarks was contradicted by the declarations submitted by the University. Juror No. 1, averred that no one told Freeman "that her input or vote didn't count or wasn't important." She recalled that Freeman herself stated something to the effect "she thought her opinion didn't matter, since the others disagreed with her." Juror No. 10 and Juror No. 11 each declared that none of the jurors told Juror Freeman that her input or opinion did not matter. Contrary to Juror Freeman's suggestion that one or more jurors were isolated and discouraged from participating, Juror No. 1 and Juror No. 10 stated that all jurors participated in all deliberations.

We infer from the trial court's finding of

"no good cause" to grant DeSouza's new trial motion that it credited the University's juror declarations on the issue whether any juror was excluded from deliberations. We will not disturb the trial court's assessment of witness credibility, or its findings of historical fact, if supported by substantial evidence. (People v. Majors (1998) 18 Cal.4th 385, 417, 424—425; Weathers v.Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 108-110; see also Fredrics v. Paige (1994) 29 Cal.App.4th 1642, 1647 [upholding trial court's denial of new trial based on counter-declarations that the jury did not render a quotient verdict].) The declarations of Juror No. 1, Juror No. 10, and Juror No. 11 support the trial court's implicit finding in favor of the University that Juror Freeman was not excluded from deliberations or told her input or opinion did not matter. There was no misconduct.

To the extent Juror No. 10's declaration supports Juror Freeman's assertion that Juror No. 1 told her "we only need nine votes," the remark was nothing more than a correct statement of the

number of votes needed to reach a special verdict. It was not of a "such a character as is likely to have influenced the verdict improperly," and did not constitute misconduct. (Evid.Code, § 1150, subd. (a).)

C. ***"Thereafter, anytime anyone brought up a comment that was favorable to the plaintiff, jurors one, (six) and eleven would interrupt. Juror number one especially was so adamant and interruptive that she forced the decisions on all the others."***

The trial court properly ruled inadmissible the second sentence of this paragraph, and DeSouza does not challenge that ruling. What remains is her complaint that Juror No. 1, Juror No. 6, and Juror No. 11 improperly interrupted the discussion. To the extent DeSouza includes this conduct in her claim some of the jurors did not listen to other jurors and excluded them from the deliberative process, we conclude there was no

misconduct. Jury deliberations are often animated, or even heated. (See Tillery v. Richland (1984) 158 Cal.App.3d 957, 977.) Indeed, "[i]f transient comments made in the heat of discussion during deliberations become a potential vehicle for attacking the verdict of the jury, freedom of discussion in the jury room is chilled, and the free exchange of ideas is inhibited." (Ibid.) It is therefore not surprising that one or more jurors may have interrupted the discussion, instead of politely waiting their turn to speak. DeSouza offers no authority for vacating the judgment and granting a new trial on this ground.

D. "Juror (No. 10) attempted to change his vote regarding damages, and several of the other jurors got on him very hard about that. It is my opinion he was intimidated into not changing his vote on that issue."

The trial court ruled this portion of Juror Freeman's declaration inadmissible. DeSouza does not expressly challenge the trial court's ruling by

proper heading and argument, but nonetheless argues that Juror No. 10 "was subjected to conduct of intimidation" by other unnamed jurors. Citing In re Stankewitz (1985) 40 Cal.3d 391. 397, she asserts that "all of the acts described in [Freeman's] declaration constitute misconduct in themselves and as such the juror's statements should be admitted to impeach the verdict."

Putting aside the problem with the form of DeSouza's argument on appeal (see People v. Turner (1994) 8 Cal.4th 137, 214. fn. 19), we conclude the trial court properly excluded Juror Freeman's speculation about the effect of other jurors' conduct on Juror No. 10. Her declaration fails to state what the unnamed jurors said or otherwise identify objectively ascertainable proof of overt acts. (Krouse v. Graham, supra. 19 Cal.3d at p. 80.) Instead, it contains only her bare, subjective impression that some jurors were "very hard" on Juror No. 10, and concludes with her interpretation of his imagined reaction. This portion of Freeman's declaration is clearly

inadmissible under Evidence Code section 1150, subdivision (a).

E. ***"On many of the jury instructions, jurors one and eleven would, in my opinion, deliberately misinterpret the meaning of certain words to favor the defendants. At one point I even asked the bailiff to please tell the judge what was going on. Jurors one, (six) and eleven had their minds made up on everything upon entering the jury room and effectively prevented an meaningful discussion after that."***

The court ruled this paragraph inadmissible. DeSouza does not expressly challenge the ruling on appeal, except to suggest that Juror Freeman's averment that Juror No. 1 and Juror No. 11 "effectively prevented any meaningful discussion" is admissible. We do not agree.

Freeman's speculation that the fact Juror

No. 1, Juror No. 6, and Juror No. 11 "had their minds made up" and effectively "prevented any meaningful discussion" is inadmissible under Evidence Code section 1150, subdivision (a). As written, Freeman's statement is bereft of any objectively ascertainable evidence of misconduct. We already explained that it is not misconduct for a juror to state where he or she stands on an issue once the case has been submitted to the jury. (Vomaska v. City of San Diego, supra, 55 Cal.App.4th at pp. 909-911.)

IV

Attorney's Fees

DeSouza and the University each sought attorney's fees in post-trial motions. The trial court ruled that the University was the prevailing party, and awarded attorney's fees and costs in the amount of $176,295.32. On appeal, DeSouza contends she was the prevailing party within the meaning of Civil Code section 1717 by virtue of having "obtained [a] jury's verdict which

proclaimed that UC breached the [i]mplied [c]ovenant of [g]ood [f]aith and [flair [d]ealing." In the alternative, she argues that the trial court should have apportioned the University's attorney's fee award between the contract and tort claims. Neither contention has merit.

A. The Prevailing Party Under Civil Code Section 1717

In analyzing the correctness of the attorney's fee award, we begin by examining the applicable statutes. (Scott Co. v. Blount, Inc. (1999) 20 Cal.4th 1103, 1108.) Code of Civil Procedure section 1021 provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." This section represents the Legislature's codification of "the 'American rule' that, ordinarily, 'each party to

litigation must bear the expense of its own attorney fees.' [Citations.] . . . [Consistent with subdivision (a) (10) of Code of Civil Procedure section 1033.5, Code of Civil Procedure section 1021 recognizes that attorney fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by the parties' agreement." (Santisas v. Goodin (1998) 17 Cal.4th 599, 607, fn. 4.)

Where, as here, the settlement agreement expressly provides for an award of attorney's fees in the event of an action to enforce the contract, Civil Code section 1717 applies.[6](Santisas v. Goodin, supra, 17 Cal.4th at p. 615.) Civil Code section 1717 provides in relevant part:

"(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to party who is

---

determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶ ...[¶]

"(b) (1) The court ..... shall determine who is the party[6] prevailing on the contract for purposes of this section .....[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

Under Code of Civil Procedure section 1032, subdivision (a)(4), "'[p]revailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant

---

[6] The unredacted settlement agreement in this case states: "If any party starts an action to enforce this [s]ettlement [a]greement and [g]eneral [r]elease, the prevailing party shall recover attorney's fees, costs and expenses actually incurred in such action."

obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides . . ."

"When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in prosecution or defense of those claims." (Scott Co. v. Blount, Inc., supra, 20 Cal.4th at p. 1109.) However, the process of awarding attorney's fees is more complicated if neither party achieves a complete victory on all the contract claims. In that circumstance, "it is within

the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.'[I]n deciding whether there is a "party prevailing on the contract, the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' [Citation.]" (Ibid.) We will not overturn the trial court's determination of which party prevailed absent a clearabuse of discretion. (Acree v. General Motors Acceptance Corp.(2001) 92 Cal.App.4th 385, 400.)

DeSouza based her causes of action f or breach of contract and breach of implied covenant of good faith and fair dealing on the parties' settlement agreement. She does not dispute that the University obtained an unqualified victory on the breach of contract claim. We already described the

fallacy in DeSouza's assertion she prevailed on the cause of action for breach of covenant of good faith and fair dealing. The jury rejected the claim she suffered damages in the form of lost wages, lost future income, and lost retirement benefits as a result off the breach of implied covenant. Because DeSouza failed to establish all the elements of a cause of action for breach of implied covenant of good faith and fair dealing, she did not prevail on that claim.[7]

We addressed a similar claim for attorney's fees under a contractual fee provision in Childers v. Edwards (1996) 48 Cal.App.4th 1544, 1546, where the buyers of residential property sued the sellers for misrepresenting flooding and drainage problems on the property. The trial court granted the defendants' motion for judgment at the close of the plaintiffs' case. It found the defendants had misrepresented the flooding and draining problems,

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[7] See discussion, ante, at pages 25-31.

but found the plaintiffs failed to prove damages. (Id. at p. 1547.) On appeal, we reversed the trial court's determination that neither plaintiffs nor defendants had prevailed f or purposes of awarding attorney's fees. We held that defendants came within the Code of Civil Procedure section 1032, subdivision (a) (4) definition of prevailing party because the plaintiffs did not "'recover any relief'" against them.(Id. at p. 1549.) We explained that "[w]inning on liability but failing to prove any damages does not result in any benefit to a plaintiff. Proving liability proves only an element of a cause of action, not the cause of action itself." (Id. at p. 1550.) Here, as in Childers, plaintiff DeSouza did not recover any relief against defendant University. We conclude the court properly awarded attorney's fees to the University as the prevailing party.

DeSouza argues on appeal, as she did in her posttrial motion, that her main purpose in challenging the University's good faith was to clear

her professional name. Citing Acree v. General Motors Acceptance Corp., supra, 92 Cal.App.4th 385. DeSouza argues the court should have invoked equitable principles to determine she was the prevailing party because "neither party prevailed sufficiently to justify an award of attorney fees." The record does not support DeSouza's claim that vindication of her good name was the main purpose of the suit. She did not proceed to trial on the cause of action for defamation included in the first amended complaint, and never attempted to state a cause of action for declaratory relief. Her prayer for relief sought only money damages. There was no basis for invoking equitable considerations in the circumstances of this case.

B. Apportionment of Attorney's Fees

DeSouza also contends that, because two of the causes of action in the instant case were not

based on contract, the court should have apportioned the attorney's fees by subtracting the amount attributable to the non-contract causes of action from the total amount of fees awarded. The principal difficulty with this argument is that DeSouza did not seek apportionment of attorney's fees in the trial court. Having acknowledged in the hearing on the parties requests for attorney's fees that fees could not be apportioned between the contract and tort causes of action, she may not claim error here.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal pursuant to California Rules of Court, rule 27 (a).

CALLAHAN , J.

We concur

BLEASE Acting P.J.

SIMS J.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

MARIA DESOUZA,
Plaintiff,

vs.

UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

CASE NO. 98AS03790

AMENDED JUDGEMENT AND DISMISSAL

DEPT:16

Defendants._/

On October 20, 2000, the Court entered judgment in favor of Defendant REGENTS OF THE UNIVERSITY OF CALIFORNIA and against Plaintiff MARIA DESOUZA following the trial of this matter. Thereafter, the Court having ruled on Defendants's Motion for Attorney Fees and there being no opposition to the Memorandum of Costs.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of Defendant REGENTS OF THE UNIVERSITY OF CALIFORNIA and fees and costs are awarded in the amount of $176,295.32.

Dated: January 25, 2000

/Michael G. Virga
Michael G. Virga
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

MARIA DESOUZA, CASE NO. 98AS03790
Plaintiff,

ORDER

vs.

UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Defendants.

_____/

Plaintiff's motion for new Trial and Motion for Judgment Notwithstanding the Verdict (JNOV) came on regularly for hearing on December 8, 2000 in Departmnet 16 of this Court, the Honorable Michael G. Virga, presiding. In addition, plainitff and defendant Regents of the University of California each presented Motions for Attorney's Fees, with both parties arguing they were entitled to such fees as the prevailing party in

the lawsuit. Finally, defendant Regents also filed a Motion to Strike the Declaration of Eunice Freeman submitted by plaintiff in support of her motions. Leonard Esquina, Jr. appeared at the hearing on behalf of plaintiff. Defendant regents was represented by Nancy J. Sheehan of the law firm of Porter, Scott, Weiberg and Delehant.

Having considered the parties' briefs, the oral argument presented by counsel at the time of hearing, and the evidence admitted at trial, the Court rules as follows:

The Motion for New Trial is DENIED. No good cause has been shown.

The Motion for Judgment Notwithstanding the Verdict is DENIED. The Court finds there is substantial evidence in support of te verdict.

The Court finds that defendant Regents was the prevailing party in this case. Consequently, plaintiff's request for attorney's fees is DENIED. Defendant Regents' Motion for Attorney Fees is Granted in the sum $162,675.00. Neither the

amount of the fees sought or the potential apportionment of the fees is disputed.

Defendant Regents' Motion to Strike the Declaration of Eunice Freeman is Granted as to page 1, lines 26-27)"Thereafter my comments and input were ignored."), page 2, lines 1-2, page 2, lines 6-7 (Juror number one especially was so adamant and interruptive that she forced the decision on all the others.") page 2, lines 8-10, and page 2, lines 11-15

It is so ORDERED.

Dated: Dec. 18 2000

/Michael G. Virga

Michael G. Virga

Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

MARIA DESOUZA,

CASE NO. 98AS03790

Plaintiff,

SPECIAL VERDICT
FORM #1

vs.

UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Defendants.

We the jury in the above-entitled action, find the following special verdict on the following questions submitted to us:

Questions No. 1: Did Defendant REGENTS breach the Settlement Agreement it had with Plaintiff Maria DeSOUZA?

Answer "yes" or "no".

Answer:	Yes	No
	____	X

Go to Question 2.

Question No. 2.: Did Defendant REGENTS breach the implied covenant of good faith and fair dealing with respect to the Settlement Agreement it had with Plaintiff Maria DeSOUZA?

Answer "yes" or "no".

Answer:	Yes	No
	X	____

If your answer to either Question No. 1 or Question No. 2 is "yes" go to Question No. 3. If your answers to both Question No. 1 and Question No. 2 are "no, sign and date this verdict form and proceed to Special Verdict Form 2.

Question No. 3: Did Plaintiff suffer economic loss, as that term has been defined in the jury instructions, as a result of Defendant's conduct?.

Answer "yes" or "no".

Answer: Yes No

____ X

If our answer to Question No. 3 is "no" sign this verdict form and proceed to Special Verdict Form #2. If your answer to Question No. 3 is "yes, go to Question No. 4.

Question No. 4: What is the total amount of economic loss suffered by Plaintiff as a result of Defendant's conduct?

Answer: $_____

Please date and sign this verdict form.

Date: 10-19-00

Barbara Getz

Foreperson

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

MARIA DESOUZA,

CASE NO. 98AS03790

Plaintiff,

SPECIAL VERDICT
FORM #1

vs.

UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Defendants.

We the jury in the above-entitled action, find the following special verdict on the following questions submitted to us:

Questions No. 1: Did Defendant REGENTS terminate Plaintiff's employment because of race? Answer "yes" or "no".

Answer:	Yes	No
	___	X

Go to Question 2.

Question No. 2.: Did Defendant REGENTS terminate Plaintiff's employment because she made complaints regarding safety?

Answer "yes" or "no".

Answer:	Yes	No
	____	X

If your answer to either Question No. 1 or Question No. 2 is "yes" go to Question No. 3. If your answers to both Question No. 1 and Question NO. 2 are "no, sign and date this verdict form and proceed to Special Verdict Form 2.

Question No. 3: Did Plaintiff suffer injury, damage, loss or harm as a result of Defendant's conduct?

Answer "yes" or "no".

Answer:	Yes	No
	____	____

If our answer to Question No. 3 is "no" sign this verdict form and proceed to Special Verdict Form

#2. If your answer to Question No. 3 is "yes, go to Question No. 4.

Question No. 4: What is the total amount of injury, damage, loss or harm suffered by Plaintiff as a result of Defendant's conduct?

Answer: $_____

Please date and sign this verdict form.

Date: 10-20-00

Barbara Getz
Foreperson

Supreme Court, U.S.
FILED
FEB 11 2004
OFFICE OF THE CLERK

(2)

No. 03-1002

In The

SUPREME COURT OF THE UNITED STATES

MARIA DESOUZA,
Petitioner,

vs.

THE UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Respondents,

Petition for Writ of Certiorari to the Court of Appeal of California
Third Appellate District

BRIEF OF RESPONDENT REGENTS OF THE UNIVERSITY OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**Counsel of Record*

QUESTIONS PRESENTED

1. "Whether the ruling of Prevailing Party is a violation of Equal Access to Justice Act, 28 U.S.C. §2412(d) (EAJA)."

2. "In light of jury finding of breach of Covenant of Good Faith and Fair Dealing, whether termination of employment and award of attorney fees results in improper taking, in violation of substantive Due Process Clauses of the U.S. Constitution."

3. "Whether the award of attorney fees is a violation of First Amendment Freedom of Speech of the U.S. Constitution."

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INTRODUCTION

Petitioner Maria DeSouza ("Petitioner" or "DeSouza") seeks the aid of this Court to overturn a state trial court decision awarding Respondent The Regents of the University of California ("the Regents") attorney's fees as provided by a settlement agreement between both parties. The contractual attorney's fee provision was enforceable through a state statute. All of DeSouza's claims, from her complaint at the trial court level to her petition for review to the California Supreme Court, were based on state law. In an attempt to obtain jurisdiction in this Court, Petitioner now alleges federal claims for the first time. Since Petitioner failed to raise a federal issue in prior proceedings, jurisdiction for her Petition for Writ of Certiorari is lacking. Accordingly, this Court should deny review.

STATEMENT OF THE CASE

Petitioner is a former employee of Respondent. Respondent originally hired DeSouza in 1983. She was terminated approximately ten years later. Subsequently, Petitioner obtained legal representation to challenge her discharge. After negotiations, both parties reached a written Settlement Agreement ("Agreement"). As part of the compromise Respondent agreed to reinstate Petitioner. The Agreement also contained a clause awarding attorney's fees, costs, and expenses to a party prevailing in any action to enforce the Agreement.

In compliance with the agreement, Respondent assigned Petitioner to work in the Molecular Cytogenetics Laboratory at the University of California, Davis, to perform medical testing. While performing laboratory medical tests, Petitioner committed significant errors. On one occasion Petitioner reported an HIV negative patient as HIV positive. DeSouza was first issued a warning and later suspended when her performance failed to improve. The performance deficiencies continued after the suspension. Thus, Respondent served Petitioner with a Letter of Intent to Dismiss. DeSouza contested her dismissal and commenced the administrative grievance proceedings provided by the Regents. After proceeding through all steps of the grievance process, the

hearing officer upheld Petitioner's dismissal.

Petitioner immediately filed suit in California Superior Court. She alleged twelve state law causes of action, including a breach of the settlement agreement and a breach of the covenant of good faith and fair dealing in performing the Agreement. The case proceeded to trial on claims of (1) breach of contract, based on the Agreement, (2) breach of the covenant of good faith and fair dealing, and (3) wrongful termination in violation of public policy. All claims were based on state law. When the jury returned its verdict, it found for Respondent on all claims but one. The jury found that Respondent had breached the implied covenant of good faith and fair dealing in its execution of the Agreement. However, the jury concluded that Petitioner did not sustain any damages as a result of that breach. Since Respondent prevailed on the breach of contract claim, the trial court awarded it costs and attorney's fees as provided by the agreement.

Petitioner appealed to the California Court of Appeal. In her appeal, Petitioner only raised four issues: (1) an exclusion of character evidence, (2) a denial of a judgment notwithstanding a verdict, (3) alleged juror misconduct under California Code of Civil Procedure §657 and California Evidence Code §1150, and (4) the apportionment of attorney's fees under California Civil Code §1717. The California Court of Appeal affirmed the trial court's rulings on all four issues. Petitioner then appealed to the California Supreme Court. The California Supreme Court denied review. Not deterred, Petitioner now appeals to this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. ACCEPTING PETITIONER'S WRIT OF CERTIORARI WOULD EXCEED THE JURISDICTION OF THIS COURT

Federal courts are courts of limited jurisdiction. (Delaware v. Van Arsdall, 475 U.S. 673, 691 (1986).) As such, a federal court may only exercise the authority conferred on it by Article III or by a congressional enactment pursuant to Article III. (Id.) This Court has

interpreted the Judiciary Act of 1789 as only granting jurisdiction to this Court to review state court decisions where a federal question was raised in a prior state court proceeding. (Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Howlett v. Rose, 496 U.S. 356, 370 (1990).) Thus, this Court has refused to decide federal constitutional issues raised for the first time on a Petition for Writ of Certiorari. (Cardinale, 394 U.S. at 438.) "[A]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-8 (1988) (emphasis original) citing Webb v. Webb, 451 U.S. 493, 501 (1981).)

Petitioner did not raise a federal claim prior to this Petition for Writ of Certiorari. Her complaint alleged twelve *state* law causes of action.[1] Her appeal to the California Court of Appeal only raised four issues for review: (1) an exclusion of character evidence, (2) a denial of a judgment notwithstanding a verdict, (3) alleged juror misconduct under California Code of Civil Procedure §657 and California Evidence Code 1150, and (4) apportionment of attorney's fees under California Civil Code §1717. Petition Appendix C-3,4. No allegation of a federal violation was made to the California Court of Appeal. After losing her appeal, Petitioner asked the California Supreme Court to review the appellate court decision without adding a federal issue. The California Supreme Court denied review. Petition Appendix A-1. Since no federal question was raised in a prior state proceeding, this Petition must be dismissed for want of jurisdiction.

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[1] (1) breach of contract, (2) bad faith, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) negligence, (6) race discrimination under the California Fair Employment and Housing Act (FEHA), (7) national origin discrimination under FEHA, (8) discharge in violation of public policy, (9) violation of California Labor Code §1102.5, (10) defamation, (11) intentional infliction of emotional distress, and (12) negligent infliction of emotional distress. Only three of these claims proceeded to trial.

B. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE FIRST QUESTION PRESENTED BECAUSE PETITIONER ASKS THIS COURT TO REVIEW AN ALLEGED VIOLATION OF A STATUTE THAT DOES NOT APPLY TO THE ACTION BETWEEN PETITIONER AND RESPONDENT.

Petitioner's first Question Presented states:

> "Whether the ruling of Prevailing Party is a violation of the Equal Access to Justice Act, 28 U.S.C. §2412(d) (EAJA)."

1. 28 U.S.C. §2412(d) DOES NOT APPLY TO PETITIONER'S CLAIMS BECAUSE THE UNITED STATES IS NOT A PARTY TO THIS ACTION

By its terms 28 U.S.C. §2412(d) only applies to civil actions where the United States is a party:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, *brought by or against the United States* in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." (§2412(d)(1)(A) (emphasis added).)

As Petitioner's own Petition for Writ of Certiorari concedes, this appeal is the product of a lawsuit between her and the Regents. Petition

at 4. The Regents is an instrumentality of the State of California. (Hamilton v. Regents of University of California, 293 U.S. 245, 257 (1934); Thompson v. Los Angeles, 885 F.2d 1439, 1442-3 (9th Cir. 1989).) Section 2412(d)(1)(A) expressly states that it only applies to actions brought by or against the United States. Nowhere in her Petition does Petitioner allege that the United States was a party to this action. Since the United States is not a party to this action, §2412(d) is inapplicable. Accordingly, the Regents respectfully request that this Court deny review of the First Question Presented by Petitioner DeSouza.

C. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SECOND QUESTION PRESENTED BECAUSE IT FAILS TO RAISE ANY COHERENT CLAIMS UNDER THE SUBSTANTIVE DUE PROCESS DOCTRINE OR THE TAKINGS CLAUSE.

Petitioner's Second Question Presented states:

> "In light of jury finding of breach of Covenant of Good Faith and Fair Dealing, whether termination of employment and award of attorney fees results in improper taking, in violation of substantive Due Process Clauses of the U.S. Constitution."

1. A CHALLENGE TO THE CONSTITUTIONALITY OF THE CALIFORNIA SUPREME COURT'S DISCRETIONARY POWER TO GRANT REVIEW MUST BE DIRECTED AGAINST THE CALIFORNIA SUPREME COURT NOT RESPONDENT

In the first subheading of the argument of the Second Question Presented Petitioner argues that: "Failure of the California Supreme Court to grant the petition for review results in improper taking." Petition at 13. If Petitioner is alleging that *the California Supreme Court*

has violated her Due Process rights by failing to grant review of the state appellate court decision, then Petitioner's Petition for Writ of Certiorari should be denied because she has asserted her Due Process claim against the wrong party. The Regents did not deny Petitioner's petition for review to the California Supreme Court nor is the Regents vicariously liable for acts or omissions of the California Supreme Court. Moreover, the California Supreme Court properly exercised its discretion to deny review. (California Rules of Court, rule 28(b),(c)(1); People v. Rios 23 Cal.4th 450, 459 (2000).) The power of a state's highest court to exercise discretionary review is well-established and not reasonably subject to dispute. (See O'Sullivan v. Boerckel, 526 U.S. 838., 845 (1999).)

The rest of this subsection makes no further argument. It merely recites some general principles of the Fourteenth Amendment and ends with a statement that Petitioner's "property and liberty interest in her employment has not been a subject of dispute during the course of trial and appeal." Petition at 15. This subsection does substantiate Petitioner's claim that Respondents violated her due process rights.

2. PETITIONER'S SECOND SUBSECTION FAILS TO RAISE ANY COHERENT REASON WHY A DUE PROCESS VIOLATION OR A TAKING OCCURRED

The heading for the second subsection of the Second Question presented states that: "Loss of State Employment Constitutes a Taking." Petition at 15. This subsection begins with a brief discussion of substantive due process violations with respect to discharges of public employees and then discusses the takings clause under the Fifth Amendment. The subsection ends with a statement, not achieving the status of a conclusion, that the Regents was awarded attorneys fees despite a finding that it violated the covenant of good faith and fair dealing. It is unclear whether this subsection actually makes an argument, but Respondent will nonetheless briefly respond to Petitioner's statements.

As Petitioner points out, a termination from public employment can in some circumstances violate the Due Process Clause. Typically, this occurs when a public employee is discharged without a hearing or other procedure. (See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann 408 U.S. 593 (1972).) This Court has also suggested that a public employee may state a substantive due process claim if his or her discharge from public employment was related to "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." (Harrah Independent School Dist. v. Martin, 440 U.S. 194, 198 (1979).) Petitioner has failed to allege either of these scenarios in her prior judicial proceedings or her Petition for Writ of Certiorari. In fact, Petitioner went through an extensive administrative process prior to her discharge. Furthermore, Petitioner has never alleged that her discharge was a result of anything related to procreation, family, or marriage. Petitioner has no basis to allege that either a procedural or a substantive due process violation occurred when she was dismissed.

The takings clause of the Fifth Amendment protects private citizens from deprivation of private property by the federal government. The Regents is not a federal government actor, thus it is not subject to the Fifth Amendment. If Petitioner meant a taking under the Fourteenth Amendment, which makes the Fifth Amendment applicable to state actors, her argument is still without merit. (Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).) A taking requires appropriation of *private* property. (Id.) No case has held that *public* employment is *private* property for purposes of the takings clause.[2] Thus, Petitioners loss of state employment could not constitute a taking of private property without just compensation.

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[2] Respondent does not disagree with the proposition that a public employee may have a "property" interest in public employment for purposes of procedural due process. See Perry v. Sindermann 408 U.S. 593, 603 (1972).

3. FEDERAL STATUES REGARDING THE APPORTIONMENT OF ATTORNEY'S FEES UNDER 42 U.S.C. §1983 ACTIONS DO NOT APPLY TO THE ACTION BETWEEN PETITIONER AND RESPONDENT BECAUSE PETITIONER NEVER RAISED A §1983 CLAIM

The heading for the third subsection of the Second Question presented states that: "DeSouza's termination is not rationally related to public purpose." Petition at 16-17. This section begins with a discussion of the "public use" requirement for a taking and the inexplicably veers off into a discussion of whether a court should award attorney's fees to a defendant when a plaintiff files a litigation in bad faith. This subsection ends with a reiteration of the concluding paragraph in the last subsection to the effect that the Regents was awarded attorneys fees despite the fact that the jury found it violated the covenant of good faith and fair dealing, albeit with no resulting damage to petitioner.

As discussed above, Petitioner has no basis for a takings claim since public employment is in no sense private property. Id. The takings clause simply does not apply to DeSouza's situation.

The second argument in this subsection appears to allege that attorney's fees should not be awarded to the Regents because it was found to have violated the covenant of good faith and fair dealing at the trial court level. In support of her argument, Petitioner cites Rosewitz v. Latting, 689 F.2d 175, 178 (10th Cir. 1982). This case briefly discusses 42 U.S.C. §1988, which gives a court discretion to award attorney's fees to a party prevailing under a 42 U.S.C. §1983 claim. This case is inapplicable to Petitioner as she did not file a 42 U.S.C. §1983 claim. In addition, the portion of Rosewitz cited by Petitioner stands for the proposition that a court may award a prevailing *defendant* attorneys fees for frivolous or vexatious claims *asserted by a plaintiff*. All irony regarding frivolous claims or appeals aside, the Regents is a prevailing defendant, therefore the issue discussed in Rosewitz would still not apply even if Petitioner had asserted a §1983 claim.

4. PETITIONERS ARGUMENT THAT THE CALIFORNIA COURT OF APPEAL MISAPPLIED STATE LAW REGARDING THE APPORTIONMENT OF ATTORNEYS' FEES IS BEYOND THE JURISDICTION OF THIS COURT

The final heading for the Second Question presented states that: "The award of attorney fees should not subject plaintiff to financial ruin." Petition at 18. This subsection briefly discusses California law regarding attorney's awards. Petitioner cites various California statutes for the general rule that an "attorney fee award must have a basis in statute, contract, or law." Petition at 19. Petitioner ends this section with a conclusion that the attorney's fees award to the Regents was inappropriate because it was not awarded pursuant to a statute. Id. Ironically enough, on the very next page of Petitioner's brief, she acknowledges that the Regents was awarded attorney's fees pursuant to a contract. Petition 20. Notably absent in this subsection is a discussion of the violation of the due process or the takings clause alleged in the Second Question Presented. Instead, Petitioner argues that the California Court of Appeal misinterpreted California law by awarding attorney's fees to Regents instead of to her.

The scope of this Court's power to review final judgments of a state court decision is set out by 28 U.S.C. §1257. That section authorizes only review of decisions from a state court "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. §1257(a). Petitioner's argument in this subsection fails to allege a violation of a federal statute or a United States constitutional provision. Instead, this section only purports to allege a misinterpretation of California law by the California Court of Appeal. Accordingly, this Court should disregard the argument in subsection four of the Second Question Presented.

D. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE THIRD QUESTION PRESENTED BECAUSE IT IS BASED ON A MISAPPLICATION OF THE LAW

Petitioner's Third Question Presented states:

> "Whether the award of attorney fees is a violation of First Amendment Freedom of Speech of the U.S. Constitution."

1. PETITIONER'S THIRD QUESTION PRESENTED ALLEGING A FIRST AMENDMENT VIOLATION IS BASED ON THE FALSE PREMISE THAT SHE IS A PREVAILING PARTY

The heading in the Third Question Presented alleges that "The award of attorney fees after a favorable jury verdict chills DeSouza's expression and her right to exercise First Amendment rights." Petition at 20. Petitioner's argument is based on the faulty premise that she received a "favorable" verdict at the trial court level. Petitioner is correct that the jury found that Respondent violated the covenant of good faith and fair dealing. Petition Appendix C-58. However, California Code of Civil Procedure §1032, which governs attorneys fees granted by contract, has been interpreted as requiring more than merely proving liability to make a plaintiff a "prevailing party." (Childers v. Edwards 48 Cal.App.4th 1544, 1549 (1996).) "Winning on liability but failing to prove any damages does not result in any benefit to a plaintiff. Proving liability proves only an *element* of a cause of action, not the cause of action itself." Id. at 1550 (emphasis original). Thus, Petitioner's argument that her First Amendment rights were violated because she did not receive attorneys fees despite being a "prevailing party" is based on a misunderstanding of the law and therefore without merit.

Petitioner also alleges that "[t]his decision has the chilling effect of deterring plaintiffs from mitigating damages and bringing lawsuits against employers even after the employer is found to have acted in bad

faith." Petition 21. This argument is also illogical. An employer cannot be found to have acted in bad faith until *after* a court has made such a determination. Thus, potential plaintiffs will not be deterred from filling actions "against employers even after the employer is found to have acted in bad faith," since no determination of bad faith would have been made at the point the suit was filed.

Petitioners arguments in support of her Third Question presented do not suggest any sound reason why this Court should accept review. Instead, Petitioners claim of a violation of her First Amendment rights stem from situations that either never happened or could not happen. Thus, Respondents respectfully request that this Court deny review of the Third Question Presented.

CONCLUSION

This petition is little more than an effort to escape the consequences of suing for breach of contract that contains a clause allowing the prevailing party to receive an award of attorney's fees and losing at trial. Had DeSouza prevailed on the breach of contract claim, she certainly would not be arguing that the clause she agreed to be bound to is unconstitutional. The jury, the State Court of Appeal, and the California Supreme Court all made the proper findings in ths case.

Since Petitioner failed to raise a federal question at the state court level, this Petition for Writ of Certiorari lacks jurisdiction. In addition, this Petition raises no important federal question or conflict between the United States Court of Appeals. Accordingly, Respondent respectfully requests that this Court deny Maria DeSouza's Petition for Writ of Certiorari in its entirety.

Dated: February 11, 2004

Respectfully submitted,

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